United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

75-1082

To be argued by
JO ANN HARRIS

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-1082

UNITED STATES OF AMERICA,
Appellee,

—v.—

MARIE WILEY and NATHANIEL JAMES,
Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Marie Wiley and Nathaniel James appeal from judgments of convictions entered on January 23, 1975, and March 14, 1975, respectively, in the United States District Court for the Southern District of New York, after a three-day trial before the Honorable John M. Cannella, United States District Judge, and a jury.

Indictment 74 Cr. 504, filed May 17, 1974, charged Wiley, James and Charles Clark in Count One with conspiracy to distribute narcotics. Title 21, United States Code, Section 846. Counts Two, Three and Four each charged distribution of cocaine in violation of Title 21, United States Code, Sections 812, 841(a)(1), 841(b)(1)(A), and Title 18, United States Code, Section 2. Clark, Wiley and James were each charged in Counts Two and Three; Clark and James alone were charged in Count Four.

Trial commenced on November 25, 1974 against Wiley and James.* At the close of the evidence Judge Cannella granted James' motion pursuant to Fed. R. Crim. P. 29 (a) with respect to Counts Two and Three, and reserved decision on a similar motion on behalf of Wiley with respect to Count Two. The remaining counts were submitted to the jury. On November 27, 1974 the jury found Wiley guilty on Count One and acquitted her on Counts Two and Three. James was found guilty on Count One and acquitted on Count Four.

On January 22, 1975 Wiley was sentenced to seven years imprisonment, to be followed by three years special parole. On March 13, 1975 James was sentenced to three years imprisonment, to be followed by three years special parole.

Wiley is presently incarcerated in lieu of $25,000 cash or surety bond pending appeal. James was remanded without bail following sentence.

Statement of Facts

The Government's Case

The proof at trial focused on three separate cocaine transactions between various of the defendants and New York City Police Detective Dorothy Johnson,** operating undercover, on October 17, October 24 and October 31, 1973.

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* Charles Clark was a fugitive until December 9, 1974. On March 14, 1975 he pleaded guilty to Count One of the Indictment and is presently awaiting sentence.

** Detective Johnson's name at the time of the events in question was Dorothy Richardson. She married prior to trial and assumed her new husband's name. She is referred to by both names in the transcript.

A. October 17, 1973

On October 17, 1973, at about 8:55 p.m., Detective Johnson arrived for a pre-arranged meeting with Charles Clark at the Blue Rose Bar, 85th Street and Amsterdam Avenue in Manhattan. Instead of Clark, Marie Wiley, a woman known to Johnson as an acquaintance of Clark's (Tr. 62)* kept the appointment. Wiley told Johnson that "Nick" (Clark) had sent her to handle the business for him and that she was going to take Johnson to the East Side to some people she knew so that Johnson could make a purchase of an ounce of cocaine (Tr. 19-20, 62, 64).** Johnson told Wiley that she wanted to deal directly with Clark because he would guarantee the cocaine. Wiley said she would get in touch with Clark, made a telephone call and, telling Johnson she would be back shortly, left the bar (Tr. 19-20).

Wiley got into a pink Lincoln Continental *** and drove to 95 West 95th Street, parked and went into the building. A few minutes later, she came out, and was joined shortly by Clark. They then drove back to the Blue Rose Bar where Johnson waited (Tr. 24, 86).

Johnson explained again why she wanted to deal directly with Clark regarding the purchase of the ounce of cocaine. Clark said that he, too, wanted Johnson to be sure of what she was getting and to assure that he would take her with him.

Clark and Johnson left the bar in Wiley's pink Lincoln Continental and drove to 240 West 104th Street in Manhattan. Clark went into the building, leaving Johnson in the car.

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* Tr. refers to trial transcript.

** The purchase had previously been negotiated between Clark and Johnson through an informant. (Tr. 70).

*** The Continental was registered to her. (Tr. 26, 60).

He came back to the car and they drove to the corner of Broadway and 104th Street where a man, introduced to Johnson by Clark as "Blind," got in and accompanied them to 106th Street, between Amsterdam and Columbus Avenues (Tr. 25, 87). There Clark and "Blind" left Johnson in the parked car and went into the Casbah Lounge. About 9:45 p.m. Clark returned to the car and handed Detective Johnson a small aluminum-foil package, stating that it was a sample. Clark then drove Johnson into Central Park, back out and then to the corner of Amsterdam Avenue and 105th Street, where he again parked the car, left Johnson in it, and proceeded to the Casbah (Tr. 26, 87). Ten or fifteen minutes later, Clark returned with "Blind" and another man. They drove to Broadway and 104th Street, where "Blind" got out and went into the building at 240 West 104th Street.

Clark then drove Johnson and the unidentified man to 85th Street between Columbus and Amsterdam Avenues. They dropped the man in front of 165 West 85th Street, proceeded down the block and parked the car.

They went into the Blue Rose Bar, Amsterdam Avenue and 85th Street, where the evening had begun. Clark stated that it would only be a few minutes, left, walked across the street to a bar, the Red Carpet Lounge, and then into 165 West 85th Street (Tr. 26-27, 88). Soon he returned to the Blue Rose and told Johnson to step outside with him. They got into the car Johnson had driven to the bar and Clark told Johnson that he had not taken her to the apartment where he had gotten the cocaine because it was being cut there at the time. He gave her three aluminum-foil packages and said that they were the remainder of the ounce, adding that it would take one-to-one-one-a-half cuts. Johnson gave Clark $1,200, told Clark she would be seeing him and drove away (Tr. 27).

B. October 24, 1973

Johnson met again with Clark and Wiley at the Blue Rose Bar at about 8:50 p.m. on October 24, 1973. The three of them sat at the bar with Clark in the middle, Wiley to his left and Johnson to his right. Johnson and Clark talked about her purchase of another ounce of cocaine. Soon Clark gave the signal for them to leave.

They got into Johnson's car which was parked a block away. At Clark's direction, Johnson drove to 16 West 88th Street. From his pocket, Clark then produced and handed to Johnson a glassine envelope containing white powder. After Johnson and Wiley had each declined Clark's offer of a "blow", Clark took a snort of the powder and said it was "really dynamite stuff." He gave the envelope to Johnson. She gave him $1,200. Clark asked Johnson to drive Wiley and him back to 85th Street. When they arrived there, Clark told Johnson that if she needed procaine * he would be able to supply her with this also. Then Wiley and Clark left the car in front of the Red Carpet across the street from the Blue Rose (Tr. 32-33).

C. October 31, 1973

Clark and Johnson arranged to meet at the same Blue Rose Bar at 9:00 p.m. on October 31, 1973 for a ⅛ kilo of cocaine deal (Tr. 38, 69-70). Clark arrived about 9:20 p.m. with two men. One was Nathaniel James, introduced to Johnson as Nat.

Clark, Johnson and James left the Blue Rose and got into a white Eldorado with a black top. Clark drove to West End Avenue and 104th Street, double-parked the car and said he was going around the block to get the pack-

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* This reads "cocaine" in the transcript, which makes little sense in the context of events.

age. He and James left Johnson in the car at about 9:40 p.m. At about 10:15 p.m., Clark and James were seen leaving the Hotel Alexandria at 250 West 103rd Street. They returned and both entered the car (Tr. 39-40, 92). Clark told Johnson if she wanted good "coke" she would have to wait for it. He also said that he had not waited for it because people were shooting up there and there were "rollers," meaning police, on the block (Tr. 40).

Then Clark gave Johnson a small sample aluminum-foil package which he identified as from the cocaine she would get later. The three of them then drove to a Blue Rose Bar at Broadway and 106th Street (Tr. 92). While they were in the bar Clark and James made a few phone calls. Clark also played a bowling machine game, leaving Johnson and James sitting at the bar. When Clark returned, Johnson asked him who Nat James was, and Clark said that James was his trusted friend and tester and that during Clark's absence, James would be handling the business for him. Clark also stated that Johnson would be able to go directly to James to get whatever she wanted as far as narcotics were concerned (Tr. 54-55).*

Clark, Johnson and James waited at the bar until 11:20 p.m., when a man came in and talked with Clark and James. Clark then told Johnson that the package was ready. The three of them left and drove to the vicinity of the Casbah Lounge on 106th Street between Amsterdam

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* This query by Johnson and response by Clark was preceded by a conversation between Johnson and James when Clark had stepped away. James said to Johnson that he was dealing in heroin, but that Johnson should not tell Clark. Judge Cannella ruled that this conversation and two others which occurred later between Johnson and James in Clark's absence, were inadmissible as against either defendant, and carefully instructed the witness to omit any reference to these conversations. (Tr. 41-51) (Government Exhibit [GX] 3505).

and Columbus Avenues. Clark told Johnson that if she saw him come out and get into a taxi, she should drive the car to Broadway and 101st Street. James, said Clark, would tell her where to drive from there. Clark then went into the bar.* About five minutes later Clark and a man came out of the Casbah and joined James and Johnson in the car. They then drove to 85th Street between Amsterdam and Columbus Avenues where Clark and the unidentified man got out and walked toward Columbus Avenue. Johnson and James again were left alone (Tr. 55-56).**

At about 11:55 p.m., Clark returned to the car where Johnson and James waited. He gave her a small package wrapped in aluminum-foil and told her it was yet another sample which she could "snort" on her way home. He also gave her a black paper bag which contained a clear plastic bag with the 1/8 kilo of cocaine she had bargained for. Johnson gave Clark $3,330 and told him she would be in touch. They then drove Johnson to Central Park West and 66th Street, where Johnson got out and caught a taxi (Tr. 56).

The Defense Case

Wiley and James offered no evidence.

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* In Clark's absence, James again talked about his heroin contacts, saying that he could get heroin that would take a nine-cut. This is one of the conversations excluded by Judge Cannella. (Tr. 41-51; GX 3505).

** And, again, James engaged Johnson in conversation about heroin. He said that he could sell 1/8 kilo for $5,000 and that he wouldn't deal in lesser quantities. He quoted a price of $17,000 for a ½ kilo and $34,000 for a kilo. He told her that he dealt directly with "the Italians" and gave her a slip of paper with his name, address and telephone number to call when she was ready to do business. He also told her of a code his wife would use on the telephone to indicate the time of any deal. Judge Cannella ruled the conversation and the note inadmissible. (Tr. 41-51; GX 3505).

ARGUMENT

POINT I

The proof of the participation of Wiley and James in a conspiracy with Clark to sell cocaine was more than sufficient.

Both Wiley and James attack the sufficiency of the evidence against them. Wiley complains of a lack of evidence of her participation in the conspiracy. James appears to concede that the evidence against him was as a whole sufficient but argues that the non-hearsay evidence of his participation in the conspiracy was insufficient to warrant the admission of certain hearsay statements by Clark which incriminated James. The contentions of both appellants are insubstantial.

A. Marie Wiley

In her attack on the evidence, Wiley points to the fact that there is no evidence that she "1) handled any narcotics; 2) handled any money; 3) conferred with any co-defendants about narcotics; 4) negotiated the sale of any narcotics; 5) or transported any narcotics or money" (Brief at 5). Even assuming the accuracy of these contentions, there is more than enough evidence against Wiley to sustain her conviction.

The evidence of the conspiracy at trial revolved around three sales of cocaine to Detective Johnson in the latter part of October, 1973. At the first of these, on October 17, 1973, Wiley met Detective Johnson at the Blue Rose Bar, announced that she had been sent by Clark, and told Johnson that she would assist Johnson in purchasing an ounce of cocaine. When Johnson insisted on dealing with Clark, Wiley went to get him. Thereafter, using Wiley's automobile, Clark and Johnson drove around the west side of Manhattan for a time, ultimately returning to the Blue Rose

Bar, to which Clark then brought the ounce of cocaine which Johnson was buying.

The next transaction, one week later, began at the Blue Rose Bar. Clark and Detective Johnson sat at the bar with Wiley and discussed the purchase of another ounce of cocaine by Johnson. Clark and Johnson, accompanied by Wiley, then drove to West 88th Street, where Clark delivered the cocaine in Wiley's presence to Johnson after Clark had offered both women a "snort" and had helped himself to one.

Taken as a whole, this evidence was more than sufficient to sustain Wiley's conviction. Wiley's active participation in the conspiracy is shown by the proof that she acted as Clark's intermediary in the first sale, and although her further direct involvement was aborted by Detective Johnson's insistence on dealing face to face with Clark, Wiley's automobile was used by Clark and Johnson in the transaction after Wiley had brought Clark in it to meet Johnson. On the second occasion, the details of the sale were arranged in Wiley's presence at the Blue Rose Bar and consummated in Wiley's presence on West 88th Street, Clark having offered Wiley a "snort" of the ounce. *United States* v. *Torres*, 503 F.2d 1120, 1124 (2d Cir. 1974); *United States* v. *Purin*, 486 F.2d 1363, 1369 (2d Cir. 1973), *cert. denied*, 416 U.S. 987 (1974); *United States* v. *Marrapese*, 486 F.2d 918 (2d Cir. 1973), *cert. denied*, 415 U.S. 994 (1974); *United States* v. *Wisniewski*, 478 F.2d 274, 279-280 (2d Cir. 1973); *United States* v. *Ruiz*, 477 F.2d 918 (2d Cir.), *cert. denied*, 414 U.S. 1004 (1973); *United States* v. *Vasquez*, 429 F.2d 615 (2d Cir. 1970). See generally *United States* v. *Falcone*, 109 F.2d 579, 581 (2d Cir.), *aff'd*, 311 U.S. 205 (1940). The fact that Wiley never handled narcotics or money is immaterial. *Yates* v. *United States*, 354 U.S. 298, 332-334 (1957); *United States* v. *Torres*, *supra*.

B. Nathaniel James

There was no evidence of James' involvement in the conspiracy until the third transaction between Clark and Detective Johnson on October 31, one week after the second one-ounce sale. However, his absence from the scene on the first two sales does not limit his liability as a member of the conspiracy, *United States* v. *Torres*, *supra*, 503 F 2d at 1124 n.2.

A slightly different analysis is required here from that applied to the complaints of Wiley, for James' arguments are focused on the trial judge's admission of two purportedly hearsay statements of Clark to Detective Johnson on October 31. The first of those statements was made at a Blue Rose Bar while Clark, James and Johnson waited for contact from the source on the night of October 31, 1973. It was then that Clark told Johnson that James was Clark's trusted friend and his tester and that James would handle Clark's narcotics business, backed by Clark's guarantee, when Clark was out of town. The second statement was made by Clark as he left James and Johnson in the car and headed for the Casbah near the end of the quest for the ⅛ kilo of cocaine on the night of October 31, 1973. At that time, Clark told Johnson that if she saw him leave the Casbah and get into a taxi she should drive to a certain corner and James, who was with her, would tell her where to go from there.*

No doubt these statements were damaging to James, but his argument that they were improperly received on an insufficient foundation is without merit. The whole of the independent evidence was such that Judge Cannella could reasonably find sufficient proof of appellant's membership

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* The argument that the evidence fails to show James present when this statement was made is based on a wishful and less than careful reading of the testimony and the reasonable inferences to be drawn from it.

in the conspiracy to distribute cocaine, by a fair preponderance of the evidence. *United States* v. *Geaney*, 417 F.2d 1116 (2d Cir. 1969), *cert. denied*, 397 U.S. 1028 (1970).* In considering the sufficiency of the non-hearsay evidence against James, the trial judge was entitled to consider the earlier transactions of Clark and Wiley with Detective Johnson as substantial evidence that a sale of cocaine by Clark to Johnson was afoot on October 31. *United States* v. *D'Amato*, 493 F.2d 359, 364 (2d Cir. 1974), *cert. denied*, 419 U.S. 826 (1974). This, taken with the non-hearsay evidence concerning the events of October 31, was more than enough to permit admission of Clark's hearsay statements under *Geaney*.

The non-hearsay evidence of the events on October 31 showed that Detective Johnson met with Clark at the Blue Rose Bar at 9:20 P.M.; James was with Clark. From there Johnson, Clark and James drove to 104th Street. Clark announced that he was going to get Johnson's "package", and he and James left the automobile with Johnson alone inside. Clark and James returned together about half an hour later, and Clark furnished a sample to Johnson, saying that he had been unwilling to remain until the balance was available and that Johnson would have to wait. The three then repaired to a Blue Rose Bar and waited. Later an unknown man came into the bar and had a conversation with Clark and James. Clark then told Johnson they were leaving and that the package was ready, and she, Clark and James set off in an automobile. They stopped on 106th Street, and Clark got out, telling Johnson that if she saw Clark leave in a taxicab, she should drive to 101st Street and then follow directions she would be given by James. This was not to be, for five minutes later Clark and an unknown man got into the car, and the four

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* James' contention that *Geaney* is no longer good law is disposed of in Point II, *infra*.

proceeded to 85th Street, where Clark and the unknown man got out. A few minutes later Clark returned with the eighth of a kilo of cocaine and, thoughtfully, a further sample for Johnson to "snort" on the way home. Johnson paid Clark $3,300.

This evidence was more than sufficient to support the Court's finding under *Geaney*. James came with Clark to his rendezvous at the Blue Rose Bar and accompanied Clark on his first unsuccessful foray to obtain Johnson's "package", a purpose Clark announced in front of James. James also accompanied Clark, Johnson and the unknown man on the second, and successful, trip to get the cocaine. His involvement in the venture is exemplified by his waiting in the bar with Clark and Johnson and his participation in the conversation between Clark and the suddenly appearing unknown man which triggered the departure of the threesome from the Blue Rose Bar on that second trip. His significant role in the delivery was further revealed by Clark's instructions to Johnson to follow James' directions if she saw Clark leaving in a taxi, a statement which is properly part of the non-hearsay proof both because it was made in James' presence, *United States* v. *Geaney*, *supra*, 417 F.2d at 1118, 1120,* and as a verbal act. *United States*

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* James argues from *United States* v. *Fantuzzi*, 463 F.2d 683, 690 (2d Cir. 1972), that this evidence cannot be considered because Detective Johnson did not testify to James' reaction when Clark made this statement. The facts of this case and those in *Fantuzzi* are quite different, however, because the remark in *Fantuzzi* was made between two persons who were out of sight in another room from the witness who testified to the remark at trial, while here the *dramatis personae* were all inside an automobile. The circumstances in *Fantuzzi* thus prevented any testimony by the witness as to the reaction by the defendant Bruno to the remark, a fact the Court found of significance. Here, however, the absence of testimony about a response by James to Clark's instructions to Johnson to follow James' directions makes clear enough that James said nothing, which, under the circumstances, strongly supports the view that Clark was speaking for both himself and James at that point.

v. *D'Amato, supra,* 493 F.2d at 363-364; *United States* v. *Tramunti,* Dkt. No. 74-1550 (2d Cir., March 7, 1975), slip op. at 2143; *United States* v. *Annunziato,* 293 F.2d 373, 380 (2d Cir.), *cert. denied,* 368 U.S. 919 (1961). All of this, taken with James' presence when, after a further stop at West 85th Street, Clark delivered the ⅛ kilo of cocaine and the sample for Johnson to use on the way home,* was more than enough to permit ". . . some basis for inferring that the defendant knew about the enterprise and intended to participate in it or to make it succeed." *United States* v. *Cirillo,* 499 F.2d 872, 883 (2d Cir.), *cert. denied,* — U.S. —, 43 U.S.L.W. 3331 (December 9, 1974). *United States* v. *D'Amato, supra; United States* v. *Manfredi,* 488 F.2d 588, 596 (2d Cir. 1973), *cert. denied,* 417 U.S. 936 (1974); *United States* v. *Ruiz, supra; United States* v. *Calabro,* 449 F.2d 885 (2d Cir. 1971), *cert. denied,* 405 U.S. 928 (1972); *United States* v. *Vasquez, supra.***

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* While Johnson did not specifically testify to James' presence at the time of the delivery, she did say that James was in the car when they drove to West 85th Street and she said nothing to suggest that he had gotten out before Clark came back with the cocaine.

** James' participation in the excursions to get cocaine for Johnson, coupled with his presence in the discussions concerning the cocaine and at the time of its delivery, distinguish completely his case from that of Bruno in *United States* v. *Fantuzzi, supra,* 463 F.2d at 689-690, replied on by James. The evidence against Bruno appears to have been merely that he frequented an apartment used by the co-conspirators, with whom he was acquainted, and "snorted" cocaine.

POINT II

The "Second Circuit standard" with respect to the admissibility of co-conspirators' declarations has not been overruled.

James, grasping at, and then distorting dictum from a footnote in *United States* v. *Nixon*, 418 U.S. 683, 701 n. 14 (1974) (hereinafter "Footnote 14"),* has declared the death knell for the "fair preponderance of the independent evidence" standard used in the Second Circuit to assay the admissibility of hearsay declarations of co-conspirators. *United States* v. *Geaney*, *supra*, 417 F.2d at 1120.

James' unsupported and unreasoned pronouncement is without basis in fact or law. In the first place, it is clear

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* This case, of course, involved the Watergate Special Prosecutor's subpoena duces tecum issued pursuant to Fed. R. Cr. P. 17(c) for tapes of conversations between the President and his subordinates. Because some showing had to be made of the evidentiary nature of the material thus subpoenaed, the Special Prosecutor urged and the Court noted as a general proposition that "[d]eclarations by one defendant may also be admissible against other defendants upon a sufficient showing, by independent evidence,[14] of a conspiracy among one or more other defendants and the declarant . . ."

Footnote 14 reads, in full:

> "As a preliminary matter, there must be substantial, independent evidence of the conspiracy, at least enough to take the question to the jury. *United States* v. *Vaught*, 485 F.2d 320, 323 (CA4 1973); *United States* v. *Hoffa*, 349 F.2d 20, 41-42 (CA6 1965), aff'd on other grounds, 385 U.S. 293 (1966); *United States* v. *Santos*, 385 F.2d 43, 45 (CA7 1967), *cert. denied*, 390 U.S. 954 (1968); *United States* v. *Morton*, 483 F.2d 573, 576 (CA8 1973); *United States* v. *Spanos*, 462 F.2d 1012, 1014 (CA9 1972); *Carbo* v. *United States*, 314 F.2d 718, 737 (CA9 1963), *cert. denied*, 377 U.S. 953 (1964). Whether the standard has been satisfied is a question of admissibility of evidence to be decided by the trial judge."

that the Supreme Court in Footnote 14 did not "adopt" what James calls a "prima facie" test—apparently meant to be proof beyond a reasonable doubt—or any other test of any kind. Further, the contention that a "prima facie" test is higher than, and by implication substantially different from, the "fair preponderance" test of the Second Circuit cannot withstand analysis. The fact is that the only sustained effort to articulate the basis underlying the co-conspirators' exception to the hearsay rule has come from the Second Circuit and is accepted and followed in some form in most of the other circuits; that any perceived difference in the measures of proof among the circuits is more imagined than real; and that if there is a difference, the Second Circuit test is by far the soundest, best-reasoned rule.

A. Footnote 14

James characterized Footnote 14 as an adoption by the Supreme Court of a test for the admission of co-conspirators' statements. It is clear that whatever the Court was about, it adopted nothing. Footnote 14 is casual dictum, gratuitously offered to illuminate one of many bases upon which the subpoenaed material in that case could be called evidentiary in nature. The quantum of proof for admissibility was in no way necessary to the decision, and indeed the two cases cited by the United States in its brief for the general evidentiary proposition enunciate no standard. Brief for the United States in *United States* v. *Nixon*, at 136, citing, *Dutton* v. *Evans*, 400 U.S. 74, 81 (1970); *Myers* v. *United States*, 377 F.2d 412, 418-19 (5th Cir. 1967), *cert. denied*, 390 U.S. 929 (1968). Also, the Court's lack of deliberateness in Footnote 14 is demonstrated by the fact that one of the cases cited does not deal with the rule at all, see *United States* v. *Morton*, *supra*, and another, *Carbo* v. *United States*, *supra*, can be characterized as applying a "fair preponderance" test.*

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* See p. 27, *infra*.

Further, the Court's bald statement that the evidence must be "at least enough to take the question to the jury," is entirely ambiguous, but in a criminal context, if read carelessly, could signal to the hopeful, as it apparently does to James, a "beyond a reasonable doubt" standard. That proposition is not only *not* supported by the cases cited by the Court or by the current law in any circuit, but would be a startling departure from the rules of admissibility of evidence noticed by the Court itself in Footnote 14 when it acknowledged that the question is a preliminary one of admissibility to be decided by the trial judge.* If such a change were truly contemplated, it would not be accomplished by ambiguous language in a footnote in a decision addressed to enforcement of a subpoena in which the proper standard for admission of co-conspirator hearsay declarations was not briefed, argued or at issue.

Finally, it may be of some interest that after the Court's decision in *Nixon* on July 24, 1974, certiorari has been denied in at least two Second Circuit cases where the "fair preponderance" test was freely exercised to sustain the convictions of some of the defendants. *United States* v. *Cirillo, supra; United States* v. *D'Amato, supra; United States* v. *Santana*, 503 F.2d 710, 713 (1974), *cert. denied*, — U.S. —, 43 U.S.L.W. 3331 (December 9, 1974). Further, the *Geaney* test, despite the dicta in *Nixon*, continues to be applied in this Circuit. E.g., *United States* v. *Gerry*, Dkt. No. 74-2100 (2d Cir., March 28, 1975) slip op. at 2601; *United States* v. *Miley*, Dkt. No. 74-2207 (2d Cir., March 19, 1975), slip op. at 2391 n.12; *United States* v. *Tramunti, supra*, slip op. at 2143; *United States* v. *Kaplan*, 510 F.2d 606, 612 (1974).

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* It might be argued that the Court was attempting to show that it prefers the rule in some circuits which requires the issue of independent evidence to be re-submitted to the jury for determination beyond a reasonable doubt, a facet of the subject not at issue here. But, if that were the case, it would presumably have cited opinions standing for that proposition. See, *Landers* v. *United States*, 304 F.2d 577, 582 (5th Cir. 1962); cf. *Meyers* v. *United States, supra.*

With all respect, it seems appropriate to conclude that when Footnote 14 was added, the Court's collective mind was otherwise occupied with matters of greater moment.

B. The Theory and Practice

Cursory research is sufficient to establish that the Judges of this Circuit have given more scholarly thought, written more words, devoted more time to the subject of the admissibility of co-conspirators' declarations than those of any other circuit. This is so, whether the measure is quantitative* or qualitative.** From *United States* v. *Nardone*, 127 F.2d 521, 523 (2d Cir.), *cert. denied*, 316 U.S. 698 (1942), to *United States* v. *Pugliese*, 153 F.2d 497, 500 (2d Cir. 1945), to *United States* v. *Dennis*, 183 F.2d 201, 230-31 (2d Cir.), *aff'd*, 341 U.S. 494 (1950), to *United States* v. *Ragland*, 375 F.2d 471 (2d Cir. 1967), *cert. denied*, 390 U.S. 925 (1968), *United States* v. *Geaney*, *supra*, and between and beyond, this Circuit has addressed the hard questions which lurk within this subject and virtually shaped the law with respect to the hearsay exception for co-conspirators' admissions.

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* By actual rough count the Second Circuit produced some 60 opinions dealing, in some part, with the subject from January 1959 through April of 1975. The Ninth Circuit produced 30, and the remainder of the circuits from three in the Fourth to some 20 in the Fifth.

** Of more interest is the fact that there is a continuing reliance in most of the circuits on the Second Circuit line of cases. See, e.g., *United States* v. *Johnson*, 467 F.2d 804, 807 (1st Cir. 1972), *cert. denied*, 410 U.S. 909 (1973); *United States* v. *Bey*, 437 F.2d 188, 190-91 (3d Cir. 1971); *Park* v. *Huff*, 506 F.2d 849, 859 (5th Cir.) (en banc); *United States* v. *Mayes*, 512 F.2d 637, 651 (6th Cir. 1975); *United States* v. *Sanders*, 463 F.2d 1086, 1088 (8th Cir. 1972); *United States* v. *Ledesma*, 499 F.2d 36, 40 (9th Cir. 1974); *United States* v. *Randall*, 491 F.2d 1317, 1319 (9th Cir. 1974); *United States* v. *Griffin*, 434 F.2d 978, 983-984 (9th Cir. 1970), *cert. denied*, 402 U.S. 955 (1971).

The only case outside the Second Circuit line which is cited with any regularity is *Carbo* v. *United States*, *supra*. It, of course, is bottomed on *United States* v. *Dennis*, *supra*.

The result is that in this Circuit there is a fair, workable and theoretically sound system with respect to these statements which represents a careful balancing of the clear necessity for this type of probative evidence, with the defendant's need for protection from a conspiracy net thrown too wide. James does not challenge the theory and the practice as a whole, but aims only at the standards of proof for admission of co-conspirator hearsay. To do so is to fail to comprehend that the standard was not thrown, willy nilly, into the mix. It is an integral part for the balance. Further, to suggest that it be replaced with an ultimate standard of "beyond a reasonable doubt," is perhaps to reveal a misunderstanding as to what the entire body of law is about.

The origin of the "exception" for co-conspirators' declaration lies in black letter law. Although its primary source will soon be the new Federal Rules of Evidence,* it is generally accepted that its historic base is in the substantive law of crime and agency which holds that:

> When men enter into an agreement for an unlawful end, they become ad hoc agents for one another, and have made a partnership in crime. What one does pursuant to their common purpose, all do, and, as declarations may be such acts, they are competent against all.

Van Riper v. *United States*, 13 F.2d 961, 967 (2d Cir.), *cert. denied*, 233 U.S. 702 (1926), citing, *Hitchman Coal & Coke Co.* v. *Mitchell*, 245 U.S. 299, 249 (1917); *Connecticut Mutual Life Ins. Co.* v. *Hillmon*, 188 U.S. 208, 218 (1903).

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* In July of 1975, Rule 801(d)(2)(E) of the Federal Rules of Evidence will become effective and the "exception" will be no more. Instead, co-conspirators' statements will be classified as non-hearsay. Except for the change in verbiage, this would appear to have no practical effect upon the issues raised here.

This principle of substantive law, which comes into play often enough in conspiracy trials, gives rise to a parallel, but entirely separate rule—a rule of evidence—which holds that the declarations of one co-conspirator, already admissible against the declarant under the rules of hearsay, are also admissible against his fellow conspirators. See *Lutwak* v. *United States,* 344 U.S. 604, 617-19 (1953); 4 Wigmore, Evidence § 1079 (Chadbourn rev. 1972); *United States* v. *Costello,* 352 F.2d 848, 854 n.3 (2d Cir. 1965), *rev'd on other ground,* 390 U.S. 39 (1968).

Neither the principle nor the rule can be applied until proof is adduced of the conspiratorial relationship between declarant and defendant and a finding is made that the statement or act in question was made or done during the pendency of the conspiracy and in furtherance of it. See, *Pinkerton* v. *United States,* 328 U.S. 640 (1946) (substantive liability for co-conspirators' acts); *Lutwak* v. *United States, supra* (admissibility of co-conspirators' statements.)

Even though the factual foundation for the application of the evidentiary rule is the same as that for the substantive principle, the principle and the rule play entirely different roles in a trial and the distinction between them is important in any analysis of the exception for co-conspirators' statements. See *United States* v. *Geaney, supra,* 417 F.2d at 1120; *Carbo* v. *United States, supra,* 314 F.2d at 736. The substantive principle, leading as it does to substantive liability, can only be applied by the ultimate finder of fact, a jury usually, in deciding ultimate matters of guilt and innocence. The measure of proof to be applied is, of course, beyond a reasonable doubt. Thus, to find a person legally liable for the acts of co-conspirators, the jury must determine whether he was a member of the conspiracy beyond a reasonable doubt. Cf. *United States* v. *Geaney, supra,* 417 F.2d at 1120. The application of the rule of evidence is an entirely different, preliminary matter. Ultimate questions are not at issue. The question is, simply, whether or not a

particular piece of evidence—an extrajudicial statement—is competent to be admitted to the body of evidence at a trial. See, *Wong Sun* v. *United States*, 371 U.S. 471, 491 (1963); *Carbo* v. *United States, supra,* 314 F.2d at 735-36. Beyond peradventure, it is a question for the trial judge, as are all matters regarding the admission of evidence. *United States* v. *Geaney, supra*, 417 F.2d at 1120. See, e.g., *United States* v. *Nixon, supra*, 418 U.S. at 701; 9 Wigmore, Evidence § 2550 (3d ed. 1940); and every Second Circuit case on the subject of the exception for co-conspirators' admissions.

Logically, since the purpose of this preliminary factual inquiry is to determine whether there is enough proof of the conspiratorial relationship to permit the use of one conspirators' admissions against another alleged co-conspirator, the admissions themselves can not be used as evidence in the decision. The rule is that the judge must decide the question on evidence independent of the offered statements. Otherwise, as the Supreme Court has noted, the very hearsay at issue would "lift itself by its own bootstraps to the level of competent evidence." *Glasser* v. *United States*, 315 U.S. 60, 75 (1942).

In this Circuit, as in most others, the trial judge's determination is final and if he finds sufficient independent evidence, the hearsay is admitted without reservation and is as competent as any other evidence. Of course, prior to submitting the case to the jury, but after making the determination as to the admissibility of such evidence, the judge is required to decide whether

> . . . upon the evidence, giving full play to the right of the jury to determine credibility, weigh the evidence and draw justifiable inferences of fact, a reasonable mind might fairly conclude guilt beyond reasonable doubt.

United States v. *Taylor*, 464 F.2d 240, 243 (2d Cir. 1972). And, if the evidence is sufficient, he must send all of the

evidence to the jury for its final determination of ultimate issues, beyond a reasonable doubt.* *United States* v. *Geaney, supra.*

C. Fair Preponderance of the Evidence

The system in this Circuit, then, contemplates three increasingly higher tests implicating co-conspirators declarations: the first to be applied by the trial judge in determining their admissibility; the second to be applied by the trial judge in determining the sufficiency of the evidence, including the co-conspirators' declarations, for submission of the case to the jury; and the third by the jury, in determining persuasiveness as it bears on ultimate issues of substantive liability. The measure for the second and third tests is "beyond a reasonable doubt." The mesaure for the first is "a fair preponderance of the independent evidence." *United States* v. *Geaney, supra,* 417 F.2d at 1120.

James apparently argues that the threshold test—the admissibility test—ought to be "beyond a reasonable doubt" as well and, further, that the trial judge should be required to make that admissibility determination with reference to how a jury would view the independent evidence. What this position fails to recognize is that *Geaney's* "preponderance" test, poised as it is at the threshold of three tiers of

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* In a few circuits the issue of whether or not there is sufficient independent proof to permit admissibility of the hearsay statements is first made by the judge and then re-submitted de novo to the jury for a finding beyond a reasonable doubt prior to their consideration of it. See, e.g., *Landers* v. *United States, supra,* 304 F.2d at 582.

This proposition has been rejected as entirely illogical time and again in the Second Circuit in a solid phalanx of cases stretching back to *United States* v. *Nardone, supra,* and in most other circuits. See cases collected in *United States* v. *Projansky,* 465 F.2d 123, 137 n. 26 (2d Cir.), *cert. denied,* 409 U.S. 1006 (1972).

tests, has nothing to do, directly, with issues of guilt or innocence, of substantive liability.* The factual predicates are the same, it is true. But *Geaney* does not stand between the evidence and the jury. *Taylor* does. The *Geaney* test merely stands between otherwise relevant raw proof and its reception into evidence.** It states a rule governing the admission of evidence, a matter which is clearly for the Court.

Since it seems uncontested that whether co-conspirator hearsay should be admitted is one for the Court, there remains only the question of what standard the judge should apply. It is worthy of note that there is no precedent in law for requiring a judge to find preliminary facts beyond a reasonable doubt prior to admitting offered proof into evidence. The "fair preponderance" test announced in *Geaney*, viewed from the perspective of the times, can properly be characterized as an effort to fix the threshold requirements for use of co-conspirator statements at a uniformly high level. Thus, Chief Judge Friendly said, after announcing the test, that "[s]etting the standard that high avoids the risk that the requirement of independent evidence will be rendered 'virtually meaningless.'" *United States* v. *Geaney, supra,* 417 F.2d at 1120.

Indeed, the few decisions in the Circuit which had dealt with the question of the standard prior to *Geaney* left

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* Appellant is not alone. The confusion between the substantive ramifications and the procedural ramifications of the underlying traditional notion of agency has been noted by commentator and court alike. See, e.g., Davenport, The Confrontation Clause and the Co-Conspirator Exception in Criminal Prosecutions: A Functional Analysis, 85 Harv. L. Rev. 1378, 1388-91 (1972); *United States* v. *Costello, supra,* 352 F.2d at 854 n. 3. It may very well account for the failure to come to grips with the definitional issues in other circuits, and indeed, was evident in early cases in this Circuit. See, e.g., *Van Riper* v. *United States, supra,* 13 F.2d at 967.

** See 1 Wigmore, Evidence § 12 (3d ed. 1940).

room for the idea that the standard could be much lower. See, *United States* v. *Ross*, 321 F.2d 61, 68 (2d Cir.), *cert. denied*, 375 U.S. 894 (1963) ("not as high as the amount need to warrant submission of a conspiracy to a jury," citing *United States* v. *Nardone*, *supra*, 127 F.2d at 523) and *United States* v. *Borelli*, 336 F.2d 376, 387 (2d Cir. 1964), *cert. denied*, 379 U.S. 960 (1965) ("likelihood of association").* Thereafter, the next case to elaborate on the subject signalled a lower test. *United States* v. *Ray-*

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* Prior to *United States* v. *Ross*, *supra*, decided in 1963, the sweep of cases in the Circuit had not really focussed on the question of the standard to be applied. Cases from *United States* v. *Dennis*, *supra*, decided in 1950, through *United States* v. *Annunziato*, *supra*, 293 F.2d at 381 had used language from *United States* v. *Pugliese*, 153 F.2d at 500, to the effect that the judge had only to decide whether, if the jury choose to believe the witnesses, the alleged co-conspirators were engaged in a joint undertaking.

At first glance it would appear that these cases might very well stand for the proposition appellant urges here. But, it must be remembered that under then prevailing Second Circuit law the standard to get the entire case to a jury was a "preponderance of the evidence." See, e.g., *United States* v. *Feinberg*, 140 F.2d 592, 594 (2d Cir.), *cert. denied*, 322 U.S. 726 (1944). And it must be further recalled that the author of *Pugliese*, *Dennis* and *Feinberg* was Judge Learned Hand, and that the author of *Annunziato* was Judge Friendly (who also authored *United States* v. *Taylor*, *supra*, which overruled *Feinberg*). It is possible, therefore, to posit that the threshold test for admissibility of co-conspirators' statements in this Circuit has always been "fair preponderance of the evidence" and that *Geaney* finally simply verbalized it. To the extent that these early cases seem to indicate that the judge was to decide the issue of admissibility with reference to what the jury might find, that too is explained by the fact that the standard of sufficiency of evidence to get to the jury was "a preponderance of the evidence." There was no need to give the question of separate tests much thought. Of course, by the time that *Geaney* was decided in 1969, although *Feinberg* had not yet been specifically overruled, it had been thoroughly repudiated. See, *United States* v. *Taylor*, *supra*, 464 F.2d at 243-44.

land, 375 F.2d 471, 477 (2d Cir. 1967), *cert. denied*, 390 U.S. 925 (1968). It bears quoting at some length here because it continues to be quoted at some length in other circuits and serves as the standard in at least half of the circuits which are said in Footnote 14 to call for evidence sufficient to take the case to a jury, and are alleged by James to use the "prima facie" case. In *Ragland*, Judge Waterman said:

> ". . . the independent evidence need not . . . be so clear and convincing as to compel, absent contradiction, a finding of the fact sought to be proved. . . .
>
> The threshold requirement for admissibility is satisfied by a showing of a likelihood of an illicit association between the declarant and the defendant although it might later eventuate that the independent evidence so admitted proves to be insufficient to justify submitting to the jury the issue of defendant's alleged guilty involvement with declarant. . . . If the issue is submitted to the jury it then becomes the function of the jury, not the trial judge, to determine whether the evidence was credible and was convincing beyond a reasonable doubt. . . . In determining preliminary questions of fact relating to admissibility of hearsay the trial judge has wide discretion . . . and need only be satisfied, if he accepts the independent evidence as credible, that that evidence is sufficient to support a finding of a joint undertaking. . . ."

Thus, it is more than arguable that in fixing a standard, at all, and in setting it at "fair preponderance" *Geaney* expressed, as the Court has on other occasions, its particular concern for guidelines and safeguards with respect to the use of co-conspirators' statements. This is reflected by the standard it chose, which is the one relied upon by the Supreme Court for findings preliminary to the admission of

constitutionally significant items into evidence. See, e.g., *Lego* v. *Twomey*, 404 U.S. 477, 488 (1972); see also *United States* v. *Miley, supra*, slip op. at 2378.

In *Lego*, the "preponderance of evidence" test was under attack and a "beyond a reasonable doubt" standard was urged upon the Court. The Court said:

> ". . . from our experience over this period of time no substantial evidence has accumulated that federal rights have suffered from determining admissibility by a preponderance of the evidence. Petitioner offers nothing to suggest that admissibility rulings have been unreliable or otherwise wanting in quality because not based on some higher standard. Without good cause we are unwilling to expand currently applicable exclusionary rules by enacting additional barriers to placing truthful and probative evidence before . . . juries."

Lego, of course, dealt with confessions. But it is of consequence here that when directly confronted with a claim that a finding of voluntariness beyond a reasonable doubt should be the necessary predicate for admission of a defendant's confession, the Supreme Court found this crucial Fifth Amendment right adequately protected by the use of a "preponderance" standard, which the Court found to be the settled test. It seems clear that the interests involved in a proper foundation for admission of co-conspirator declarations requires no higher a threshold of admissibility.

D. The So-Called "Prima Facie" Test

The import of James' argument is that the Supreme Court and other circuits use a standard which is different from, and higher than, "fair preponderance," as it is used in the Second Circuit to test the admissibility of co-conspirators' declarations. For authority, he cites what must be

characterized as a careless footnote in a Supreme Court decision on another subject, and three of the six cases therein. His failure to analyze or to even hazard a definition of the alternative test he promotes, is surpassed only by a paucity of the same in opinions of other circuits on the subject of tests of any ilk.*

To attempt to begin where James' argument ends, the Government is confronted with two empty phrases: "enough to take the question to the jury" and "prima facie." The fact is that neither, without a standard, means anything. "Prima facie" without a context means nothing more or less than "facts in evidence which if unanswered would justify men of ordinary reason and fairness in affirming the question plaintiff is bound to maintain." 9 Wigmore, Evidence § 2494 (3d ed. 1970). That definition says nothing of the measure to be applied; what it does say is that a party must satisfy the particular finder of the particular fact at issue with whatever quantum of proof is required. As such "prima facie" does not represent a fixed test, but takes its meaning from the standard at hand. When the context changes, its content changes. Cf. *United States* v. *Taylor*, *supra*, 464 F.2d at 242. The phrase "enough to take the question to the jury", as its meaning may be gleaned from *United States* v. *Nixon*, *supra*, seems to take color in the first instance from the quantum of evidence first expressed in the main text of the opinion—"sufficient showing by independent evidence"—and from the initial expression of the test at the beginning of Footnote 14—"substantial, independent evidence". These two expressions are entirely consistent with the standard of "fair preponderance" laid down in *Geaney*. The subsequent quantification, on which James'

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* The notable exception is *Carbo* v. *United States*, *supra*, 314 F.2d at 737, the only case cited by the Supreme Court in Footnote 14 which throws any light on the issue. It was conveniently omitted from the cases James chose to cite in his brief, for reasons which will appear, *infra*.

argument is entirely grounded—"at least enough to take the question to the jury"—is both internally ambiguous (for what is the question, and why is it to be taken to the jury?) and must be read in the light of the Court's preceding remarks. Furthermore, the expression "enough to take the question to the jury" must be read in the light of the cases cited by the Court immediately thereafter in the footnote.

It may be of some moment, then, that none of the cases cited put content into the phrase except for *Carbo* v. *United States, supra*. *Carbo's* analysis rests entirely on *United States* v. *Dennis, supra*, one of *Geaney's* key predecessors in the Second Circuit. *Carbo* defines "prima facie case" as "one which would support a finding" (which does not advance the definition very far), and elsewhere in the opinion, in a discussion of whether the preliminary question should be decided by judge or jury, indicates that "prima facie" as used there means much less than "beyond a reasonable doubt." 314 F.2d at 737.

In that light, it is worth noting that the Ninth Circuit has recently taken to relying on the portion of *United States* v. *Ragland, supra*, 375 F.2d at 477, set out at some length in Subpoint C.* See, e.g., *United States* v. *Ledesma, supra; United States* v. *Randall, supra; United States* v. *Griffin, supra.*

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* A survey of current cases on point in the other circuits reveals that *Ragland* is also being relied upon heavily in the First (*United States* v. *Johnson, supra*); Third (*United States* v. *Bey, supra*); Fifth (*Park* v. *Huff, supra*); and Eighth (*United States* v. *Sanders, supra*). The Sixth Circuit relies on *Geaney* (*United States* v. *Mayes, supra*).

Of the circuits remaining, the Seventh has recently said that the independent evidence need not be beyond a reasonable doubt and that "slight evidence is sufficient". *United States* v. *Fiorito*, 499 F.2d 106, 110 (7th Cir. 1974). The Fourth, Tenth and D.C. Circuits do not appear to have come to grips with the issue of a test at all.

Only in two circuits has "prima facie" even been touted to mean any more or less than the "preponderance" test announced in *Geaney* and stated in *Ragland*.

In *United States* v. *Oliva*, 497 F.2d 130, 132-34 (5th Cir. 1974), the Court noted that it had never stated in explicit terms the standards to be used by the trial judge in determining the sufficiency of the evidence other than hearsay, and said

> We define the test as whether the government, by evidence independent of the hearsay declarations of a co-conspirator, has established a prima facie case of the existence of a conspiracy and of the defendant's participation therein, that is whether the other evidence aliunde the hearsay would be sufficient to support a finding by a jury that the defendant was himself a co-conspirator.

In addition, the *Oliva* court cited one of its own earlier cases which required "evidence pointing, with the degree of clarity required for conviction in such cases, to appellant's guilt". *Panci* v. *United States*, 256 F.2d 308, 311 (5th Cir. 1958). The Court in *Oliva* also noted that the First, Eighth and Ninth Circuits had expressly adopted the same test.

The authority of *Oliva* collapses under analysis. The First, Eighth and Ninth Circuits have adopted no such test, explicitly or implicitly. In fact leading recent cases in each of those circuits rely on the Second Circuit's *Ragland*. Two of those circuits quote extensively from the portion of *Ragland* which unmistakenly heralds *Geaney*. See cases cited, *supra*, page 27 and n.1. But the weakness of *Oliva* as authority does not stop with its mere misstatement of authority. After it pronounced the adoption of the "prima facie" test in 1974, the Fifth Circuit has produced three opinions in as many months during 1975, applying two other tests. See, *United States* v. *James*, 510 F.2d 546,

549 (5th Cir. 1975), quoting from *Ragland* as cited in *United States* v. *Johnson, supra; United States* v. *Gomez-Rojas,* 507 F.2d 1213, 1223 (5th Cir. 1975) which says it is applying the "prima facie" test, but approves the re-submission of the entire issue to the jury for determination; and *in banc, Park* v. *Huff, supra,* 506 F.2d at 859, relying on and quoting extensively from *Ragland.*

Meantime, it is of more than passing interest that the Sixth Circuit in *United States* v. *Mayes, supra,* 512 F.2d at 651, has announced:

> We agree that a prima facie case of the conspiracy and the defendant's connection with it must be established by evidence independent of that offered * * * *However a prima facie case is less than proof beyond a reasonable doubt; indeed, it is less than a preponderance. South-East Coal Co.* v. *Consolidation Coal Co.,* 434 F.2d 767, 779 (6th Cir. 1970), *cert. denied,* 402 U.S. 983 (1971) (Emphasis added).

E. Conclusion

Given the strength in reason and precedent of this Circuit's "fair preponderance" standard, its wide acceptance in other circuits, and the ambiguity and brevity of the dictum of the Supreme Court which is said to have undone the *Geaney* rule in a case in which the issue was not presented, the settled law in this Circuit should not be altered. Finally, and almost parenthetically, we submit that the independent evidence of James' involvement in the conspiracy was sufficient under the standard he claims is now controlling.

POINT III

The cautionary "subject to connection" charge to the jury was not plain error.

Upon the first breath of hearsay in this case—Johnson's testimony of her conversation with Wiley about Clark on October 24, 1973—counsel for James asked the Court to instruct the jury that the conversations were not binding on his client.* (Tr. 20).

The Court immediately responded by reading what can be fairly characterized as a full explanation of the law of conspiracy, much as it is formally charged to the jury at the end of the case. (Tr. 21-24). The explanation included a statement of the law in this Circuit with respect to the jury's province to consider all of the evidence:

> "In determining whether the evidence established the existence of a conspiracy, and also the defendant's participation in it, you must consider all the actions and declarations of the alleged participants." (Tr. 22)

Several paragraphs later the Judge told the jury, in the context of the hearsay objection raised by counsel:

> ". . . if it is established beyond a reasonable doubt that a conspiracy existed and that the defendant was one of the members, then the acts and declarations of any other member . . . may be considered as evidence. (Tr. 22-23).

Later in the cautionary instruction, the Judge told the jury:

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* It is doubtful that it would have ever occurred to the jury that such statements would be relevant to James, if counsel hadn't pointed it out.

> ". . . what [counsel] is saying is that at this point we have not proved the conspiracy yet and, therefore, anything that one of these people says should only be used against that person. . . . In other words, if you find that the particular defendant involved was a member of the conspiracy, then these acts and declarations . . . may be used against that particular person. So I take the evidence subject to connection. If the evidence is not connected, then the lawyer can move to strike it, and if it is not connected I will grant the motion. Then you will be told to disregard it. On the other hand, if the conspiracy is shown, and the defendant's participation in it, then these acts and declarations will be considered by you as far as the proof in the case." (Tr. 23-34).*

James asserts that when, at the end of the case, the jury was charged that they could consider all of the evidence, the necessary implication to the jury was the Judge had found the defendants guilty beyond a reasonable doubt. The argument is wholly without merit.

First it should be noted that nothing in these cautionary instructions suggested that the Court would make preliminary evidentiary findings of the existence of the conspiracy and the defendant's membership in it; if anything, the preliminary instructions seem to suggest that it would be for the jury to do so. Moreover, the motions to strike the hearsay, and the Judge's denial of those motions, was made out of the presence of the jury. (Tr. 112-13). Thus, the jury was never explicitly aware that the motions had been made,

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* The next day, upon the offer of one of the statements contested here by James, the Judge cautioned the jury: " . . . if you find there was a conspiracy and the defendant was a member of it, conversations made by others in furtherance of the conspiracy, during the life of the conspiracy are allowable and admissible against the absent one or the other person." (Tr. 54-55).

denied and the evidence connected. All they knew was that in his formal charge to them the Judge restated the proposition that they could consider all of the evidence. (Tr. 190). And to the extent that he called attention to his earlier remarks at all, it was because he found it necessary to deviate in order to correct the misstatement of the law made during summation by James' counsel to the effect that the jury was required to find a conspiracy and the defendant's membership on the basis of independent evidence only. (Tr. 125).*

Further, there was never an objection to any part of these particular charges at any point during the trial. Counsel did not object to the cautionary charge (Tr. 24); or when the Judge informed counsel of the substance of his formal charge prior to the time he gave it (Tr. 100-105); or at the time of the motions to strike (Tr. 112); or at the end of the charge to the jury (Tr. 181-82, 192-95). The formal charge to the jury was correct and complete, and entirely typical of such charges in this district.

Clearly this is a situation where the jury was properly instructed by the whole of the formal charge. The Court's cautionary charge, assuming that it raises the remote possibility of confusion in conjunction with the formal charge (and counsel's "charge"), does not rise to plain error, and plain error is the standard applicable, there having been no objection. *United States* v. *Pinto*, 503 F.2d 718, 723-724 (2d Cir. 1974); *United States* v. *Brawer*, 482 F.2d 117, 130 (2d Cir. 1973). Compare *United States* v. *Rosa*, 493 F.2d 1191, 1195 (2d Cir.), *cert. denied*, 419 U.S. 850 (1974).

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* Counsel, of course, compounded the problem by so doing. Counsel knows better. Cf. *United States* v. *Miller*, 381 F.2d 529, 533-34 (2d Cir. 1967), *cert. denied*, 392 U.S. 929 (1968).

POINT IV

Wiley's sentence was well within the bounds of the Trial Judge's discretion.

The sentencing minutes of January 22, 1975 with respect to Wiley, which specifically incorporate by reference the presentence report in this matter (Sentencing Transcript 24), demonstrate that Judge Cannella's sentence of Wiley was based on consideration of her as an individual and did not reflect any fixed sentencing policy—nor does Wiley assert that such is the case. There are no allegations of error in the presentence report which was relied upon by the Judge, and the defendant is over-age for treatment under the Youth Corrections Act. The consideration of deterrence articulated by the trial judge, far from being improper, is, in fact, a recognized factor in the sentencing equation. E.g., *United States* v. *Kaylor,* 491 F.2d 1133, 1139-40 (2d Cir. 1974) (en banc), vacated and remanded on other ground, 418 U.S 909 (1974); *United States* v. *Velazquez,* 482 F.2d 139, 141 (2d Cir. 1973). See, also *United States* v. *Baker,* 487 F.2d 360, 362, 363 (2d Cir. 1973) (dissenting opinion of Lumbard, *C.J.*); *United States* v. *Braun,* 382 F. Supp. 214, 215 (S.D.N.Y. 1974) (Frankel, *J.*). Cf. *United States ex rel. Sero* v. *Preiser,* 506 F.2d 1115, 1124 (2d Cir. 1974). In other words, there is not a single conceivably valid basis, raised or apparent, for disturbing the proper exercise of discretion by the trial judge with respect to this entirely legal sentence. See e.g., *Dorszynski* v. *United States,* 418 U.S. 424, 440-41 (1974); *United States* v. *Tucker,* 404 U.S. 443, 447 (1972); *United States* v. *Hendrix,* 505 F.2d 1233, 1235 (2d Cir. 1974).

CONCLUSION

The judgments of conviction should be affirmed.

Respectfully submitted,

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